U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-B-, INC.

DATE: NOV. 30, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner describes itself as "Gold IRA Specialists" and seeks to permanently employ the Beneficiary as an "Industrial Engineer/ Quantitative Analyst," requesting immigrant classification as an advanced degree professional. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the immigrant visa petition. The matter came before us on appeal, which we dismissed on February 1, 2013. The Petitioner filed a motion to reopen and reconsider our decision, and we reopened and affirmed the prior decision on August 15, 2013. The Petitioner filed a second motion to reopen and reconsider, and we reopened the matter and affirmed our prior decision on May 9, 2014. The Petitioner filed a third motion to reopen and reconsider, and we affirmed our prior decision on December 23, 2014. The Petitioner filed a fourth motion to reconsider, and we affirmed our prior decision on May 7, 2015. The matter is again before us on a motion to reopen and reconsider. The motions to reopen and reconsider will be denied.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis.[1] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.

The Petitioner asserts that the motion to reopen is properly filed under 8 C.F.R. § 103.5(a)(2) because it provides evidence regarding the certification of a new ETA Form 9089 and the approval of a new Form I-140 for the same job opportunity. The Petitioner also asserts on motion that our previous decision constituted an erroneous decision through misapplication of law or policy and therefore qualifies for consideration as a motion to reconsider under 8 C.F.R. § 103.5(a)(3). Accordingly, the Petitioner's motions to reopen and reconsider are properly filed.

[1] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[2] The priority date of the petition is August 21, 2011.[3]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in "Industrial Engineering."
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: "Business Administration or related field."
H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A. If Yes, specify the alternate level of education required: Other.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: "Combination of education and experience in lieu of a Master's degree."
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "4."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.12. Are the job opportunity's requirements normal for the occupation? Yes.
H.14. Specific skills or other requirements: Applicant must have a combination of education and experience equivalent to a Master's degree in Industrial Engineering, Business Administration, or a related field, with strong statistical background and analytical skills and a minimum of three years of experience in the financial industry. Excellent writing and communication skills are also necessary. (The three years of experience in the financial industry is a necessity of the business to ensure sufficient exposure to the financial services industry to enable the applicant to perform the required duties effectively. This experience may have been gained either as a part of the degree equivalency or separately.) (The 4 years of experience in Block H.8-C. reduces to 2 years for a Bachelor's degree holder in any of the specified fields.)

The Director concluded that the *position* offered does not meet the minimum requirements for classification as a member of the professions with an advanced degree. We affirmed the director's decision on appeal and the motions that followed. Specifically, we held that the position offered does not meet the requirements of the advanced degree professional category because the alternate requirements stated in Parts H.8 and H.14 of the ETA Form 9089 allow for experience that falls below the requirement of an advanced degree, or alternatively a bachelor's degree and five years of experience.

[2] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[3] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The Petitioner raises the following issues in this motion to reopen and reconsider our prior decision: (1) that the numbers "4 and 2" as indicated in Parts H.8 and H.14 of the ETA Form 9089 refer to Specific Vocational Preparation and not years of work experience; (2) that because the DOL certified that the alternate requirements of Parts H.8 and H.14 are "substantially equivalent" to the primary requirements, USCIS does not have authority to determine that the alternate requirements do not qualify the position for advanced degree classification; and (3) that a new Form I-140 which was subsequently approved for this same position demonstrates that our previous decisions were in error.

II. LAW AND ANALYSIS

The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), which, in pertinent part, provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.*

A. Eligibility for the Advanced Degree Professional Classification

As indicated above, the labor certification states the following requirements:

Primary requirements:
H.4. Education: Master's degree in "Industrial Engineering."
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: "Business Administration or related field."

Alternate requirements:
H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A. If Yes, specify the alternate level of education required: Other.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: "Combination of education and experience in lieu of a Master's degree."
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "4."

Part H.14 also states, in pertinent part, that "the 4 years of experience in Block H.8-C. reduces to 2 years for a Bachelor's degree holder in any of the specified fields."

These terms of the labor certification indicate *primary requirements* of a master's degree and three years of experience and *alternate requirements* of unspecified education and four years of experience or a bachelor's degree and two years of experience. At issue in this case is whether these

alternate requirements mean that the position offered does not qualify for classification as an advanced degree professional position because it allows for less than five years of experience.

The Petitioner asserts that because the DOL has certified that these alternate terms are "substantially equivalent" to the primary requirement of a master's degree, USCIS cannot conclude that the alternate terms do not qualify the position for advanced degree classification. The Petitioner specifically asserts that the numbers "2 and 4" as indicated in Parts H.8 and H.14 refer to Specific Vocational Preparation (SVP) and not years of experience. We do not find this argument to be persuasive. Whether USCIS views the numbers "2 and 4" as years of SVP or years of experience does not change the actual minimum requirements for the offered position as stated on the labor certification. The DOL views the years of SVP as a one-to-one ratio with years of experience.[4] Because one (1) year of experience is equivalent to one (1) year of SVP, the DOL would also equate 2 or 4 years of SVP to be equivalent to 2 or 4 years of experience. Therefore, whether the terms of Part H.8 and H.14 are understood to mean years of SVP or years of experience, the conclusion would be the same.[5]

The Petitioner asserts that because Part H.8-C begins with "if applicable," the completion of this part of the ETA Form 9089 was not required and should not be considered to alter the primary requirements for the offered position. However, the instructions to the ETA Form 9089 state, "if the answer to question 8 is *Yes*, enter the number of years of experience in the job offered that is acceptable in combination with the level of education specified in question 8-A."[6] Here, the Petitioner answered *Yes* to question 8, therefore an answer to question 8-C was required and must be considered.

Accordingly, the alternate terms of the labor certification as stated in Parts H.8 and H.14 would allow a beneficiary with unspecified education and four years of experience or a bachelor's degree and two years of experience to qualify for the position offered. However, the regulation at 8 C.F.R. § 204.5(k)(2) clearly states that "A United States baccalaureate degree or a foreign equivalent degree followed by at least *five years* of progressive experience in the specialty shall be considered the equivalent of a master's degree." Therefore, the ETA Form 9089 allows for alternate experience requirements that fall below the five-year experience requirement for classification as an advanced degree professional. The position offered does not meet the minimum requirements for classification as an advanced degree professional position.

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[4] *See Mcafee, Inc.*, 2011-PER-02953 (Bd. Alien Lab. Cert. App. Apr. 1, 2014); *see also* https://www.onetonline.org/help/online/svp.

[5] We also note that the alternate terms of the labor certification did not need to be lower than five years of experience to be "substantially equivalent" to the primary requirements. As stated above, the primary requirements of the labor certification are a master's degree and three years of experience, which equates to 7 SVP years (a master's degree which equals 4 SVP years plus 3 years of experience which equals 3 SVP years). Had the Petitioner required a bachelor's degree and five (5) years of experience, this would have also been equal to 7 SVP years (a bachelor's degree which equals 2 SVP years plus the 5 years of experience or 5 SVP years). *See Agma Systems LLC*, 2009-PER-132 (Aug. 6, 2009) (concluding that a Master's degree plus 3 years of experience, which has an SVP of 7 lapsed years, is the equivalent to a Bachelor's degree plus 5 years of experience, which also has an SVP of 7 lapsed years).

[6] *See* http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (accessed November 24, 2015).

B. USCIS Authority to Determine Eligibility for the Classification Sought

In our previous decisions, we addressed the division of authority between the DOL and USCIS in employment-based immigrant petitions requiring an underlying labor certification. Specifically, we concluded that USCIS has the authority, independent of the DOL's authority, to interpret the requirements of the labor certification to determine whether the *position* offered as stated on the labor certification, including both the primary and alternate requirements, qualifies for classification under the category requested.[7]

The Petitioner again asserts on motion that "evaluation of the *position* falls to the sole responsibility of the DOL under the statute." The Petitioner asserts that USCIS does not have authority to determine whether the position offered meets the requirements for advanced degree classification because the DOL has certified that the primary and alternate requirements are "substantially equivalent." The Petitioner states the following on motion:

> [O]nce the DOL has certified equivalency of primary and alternate educational and experience requirements for the position, the USCIS has no business and no authority under statutory, regulatory, or case law to question that equivalency determination. If the two requirements are certified to be equivalent, then one, by definition of equivalency cannot be less than the other.

The "substantial equivalence" language indicated in 20 C.F.R. § 656.17(h) is considered separate and apart from the responsibility of USCIS under 8 C.F.R. § 204.5(k) to independently determine whether the job offer portion of the labor certification meets the requirements for classification under the Act. These are two separate matters that are governed independently by the regulations for both agencies.

The DOL regulation at 20 C.F.R. § 656.17(h) states, in pertinent part:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones.
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> . . .

[7] The Petitioner previously cited *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007), for the premise that the DOL, and not USCIS, has the authority to determine whether a *position offered* qualifies under the classification requested. In our prior decision, pursuant to the Supreme Court's holding in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967, 982-84, 125 S. Ct. 2688, 2700-01, 162 L. Ed. 2d 820 (2005) we reached a different conclusion from the holding of *Hoosier Care* regarding the division of authority between the DOL and USCIS. We held that USCIS has the authority to determine whether the terms of the labor certification, including primary and alternate requirements, meet the regulatory requirements to qualify for classification of the *position* under the particular category requested.

> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought.

Thus, when DOL certifies that the primary and alternate requirements are "substantially equivalent," it is certifying that these requirements are "normally required for the occupation," which is addressed in Part H.12 of the labor certification. If the alternate requirements are not normally required, the petitioner would need to demonstrate business justification for any requirements that are above the normal requirements to the DOL. The determination of whether the primary and alternate requirements are "substantially equivalent" is separate from the determination of whether the position offered meets the requirements for classification as an advanced degree professional position.

As stated above, the regulation at 20 C.F.R. § 656.17(h) states that "the job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones."[8]

The position offered must meet both the DOL's regulations and those of USCIS. The Petitioner must balance the requirements of the DOL with those of USCIS, and if the labor certification states minimum requirements lower than the threshold for advanced degree professional classification, the position will not qualify for this classification.[9]

The USCIS regulation pertaining to advanced degree professionals at 8 C.F.R. § 204.5(k) states that the job offer portion of the labor certification, which includes both primary and alternate terms, requires an advanced degree. Specifically, this regulation at 8 C.F.R. § 204.5(k)(4)(i) states the following, in pertinent part:

> (i) *General.* Every petition under [classification for advanced degree professionals] must be accompanied by an individual labor certification from the Department of

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[8] O*NET is the current occupational classification system in use by the DOL. O*NET, located at http://online.onetcenter.org, is described as "the nation's primary source of occupational information... containing information on hundreds of standardized and occupation-specific descriptors." http://www.onetcenter.org/overview.html (accessed September 25, 2015). O*NET incorporates the Standard Occupational Classification (SOC) system which is designed to cover all occupations in the United States. *See* http://www.bls.gov/soc/socguide.htm (accessed September 25, 2015) (relating to the 2000 SOC); http://www.bls.gov/soc/home.htm (accessed March 29, 2011) (relating to the 2010 SOC). In this case, the labor certification states that the SOC code of the position offered is 13-2051.00, Financial Analysts, Skill Level III. O*NET states that the position offered has an SVP level range of 7 to 8 and classifies it in Job Zone Four. *See* http://www.onetonline.org/link/summary/13-2051.00.

[9] *See* the Memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, and William R. Yates, Deputy Executive Associate Commissions, Office of Field Operations, "Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants," HQ 70/6.2, AD00-08, March 20, 2000. In our previous decision, we cited a portion of this memorandum which states, "[I]f the job itself does not require an advanced degree professional, the petition must be denied, even if the alien beneficiary actually is an advanced degree professional." The Petitioner has not addressed this on motion.

> Labor . . . . *The job offer portion of the individual labor certification . . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent . . . .*

Accordingly, the regulation at 8 C.F.R. § 204.5(k)(4)(i) requires that USCIS determine whether the *position offered* meets the requirements for an advanced degree professional position. As noted in our previous decisions, the DOL regulations at 20 C.F.R. § 656.17 do not indicate that DOL must certify a particular position under a particular immigrant visa classification. Therefore, USCIS has authority, independent of the DOL, to determine whether the terms of the labor certification meet the requirements for the classification requested.

C. The Subsequently Approved Petition

The Petitioner asserts that a subsequent approval of Form I-140 (LIN 15 009 50557) for the same position offered demonstrates that our previous decisions were in error. The Petitioner submitted a copy of the Form I-140 approval notice and the new underlying labor certification upon which the decision was based. However, the later filed ETA Form 9089 differs from the instant ETA Form 9089, in that the new labor certification lists the minimum requirements for the offered position as a bachelor's degree and five years of experience with no acceptable alternate education and/or experience. The minimum requirements as listed on the new labor certification do not fall below the requirements for classification as an advanced degree. Therefore, the approval of this later filed Form I-140 does not demonstrate that our prior decisions were in error.

II. CONCLUSION

In summary, USCIS has the authority to determine whether the position qualifies for classification under the Act despite the DOL's certification that the alternate terms of the position are "substantially equivalent" to the primary requirements. The petitioner has not demonstrated that the position offered meets the requirements of the advanced degree professional category. The offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-B-, Inc.*, ID# 14711 (AAO Nov. 30, 2015)